IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11039 of 1994

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DHORAJIA BROTHERS

Versus

ASSTT. COMMISSIONER OF INCOME-TAX

Appearance:

1. Special Civil Application No. 11039 of 1994

MR HM TALATI for Petitioner No. 1

MR SN SHELAT for Respondent No. 1

MR MANISH R BHATT for Respondent No. 2

MR MJ THAKORE for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 05/08/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

This petition under Article 226 of the

Constitution challenges two notices dated 20.7.1994 issued by the Assistant Commissioner of Income-tax, Circle 6(1), Ahmedabad, respondent No.1 herein, under Section 148 read with Section 147 of the Income-tax Act, 1961 (hereinafter referred to as "the Act") for AYs. 1981-82 and 1982-83 (Annexure "H" Colly.).

2. In response to the notice, affidavit in reply has been filed by the first respondent and the reasons recorded for reopening the cases are also produced for both the years. In substance, the reasons for both the years read as under :-

> "..... ... As the assessee's business is in the line of construction and it has claimed investment allowance under Section 32A of the Act which is not allowable as per the Supreme Court decision (dated 7.9.1993 in NC Budharaja & Co., 204 ITR 412), I have reason to believe the income is escaped assessment. Therefore, the case is reopened for reassessment under Section 148 read with Section 150 of the Income-tax Act."

3. Various contentions are raised in the petition in support of the challenge to the above notices including the ground of limitation.

4. It is, however, not necessary go into any of those challenges as Mr Manish R Bhatt, learned standing counsel for the revenue has invited our attention to the fact that for AY 1981-82 itself the issue, on the basis of which the present impugned show cause notices were issued, was referred for the opinion of this Court in Income-tax Reference No. 31 of 1992. The question was as under :-

> "Whether, the Appellate Tribunal is right in law and on facts in holding that the assessee is an industrial undertaking and entitled to deduction on account of investment allowance ?"

By our judgment dated 16.10.2001, we have answered the question in the negative i.e. in favour of the revenue and against the assessee following the decision of the Apex Court in CIT vs. NC Budharaja, 204 ITR 412 taking the view that construction of roads, buildings, etc. is not an industrial activity as contemplated by the provisions of Section 32A of the Act and, therefore, the assessee is not eligible to investment allowance under the said provisions.

When the matter was pending in reference before this Court on the same issue, there was no justification for the Assessing Officer to issue any notice for reopening the assessment for the same year under Section 148 read with Section 147 of the Act.

5. Similarly, for AY 1982-83, the learned standing counsel states that the revenue's reference application was rejected, but this Court had directed the Tribunal to refer an identical question for opinion of this Court. Thus, for AY 1982-83 also when the impugned notice was issued under Section 148/147 of the Act, the reference was very much pending before this Court. Hence, for AY 1982-83 also, when the reference was pending on the same issue, there was no justification for the Assessing Officer to issue any notice under Section 148/147 of the Act for the same assessment year when the same issue was pending before this Court in reference.

6. On the aforesaid ground, we quash both the notices dated 20.7.1994 (Annexure "H" Colly.) issued by the Assistant Commissioner of Income-tax, Circle 6(1), Ahmedabad, respondent No.1 herein, under Section 148 read with Section 147 of the Income-tax Act, 1961 for reopening the assessments for AYs 1981-82 and 1982-83.

7. Rule is made absolute to the aforesaid extent with no order as to costs.

(M.S. Shah, J.)

(D.A. Mehta, J.)
sundar/-